FILED
U.S. Bankruptcy Appellate Panel of the Tenth Circuit

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Barbara A. Schermerhorn Clerk

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE TENTH CIRCUIT

IN RE LEON ALLISON BOLDRIDGE, doing business as S&L Boldridge Construction, Debtor.	BAP No. KS-01-005
LEON ALLISON BOLDRIDGE, Appellant, v. UNITED VAN LINES, INC.; FRY-WAGNER MOVING & STORAGE COMPANY; and ABC/FRY-WAGNER, INC., Appellees.	Bankr. No. 00-20972 Chapter 7 ORDER AND JUDGMENT*

Appeal from the United States Bankruptcy Court
for the District of Kansas

Before McFEELEY, Chief Judge, CLARK, and BOHANON, Bankruptcy Judges.

BOHANON, Bankruptcy Judge.

This Court has before it the Order of the United States Bankruptcy Court for the District of Kansas, denying the debtor-appellant's request to avoid the lien of United Van Lines, Inc., Fry-Wagner Moving and Storage Company, and ABC Fry-Wagner, Inc. For the reasons stated below, we conclude that the decision of the Bankruptcy Court should be affirmed.

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* This order and judgment has no precedential value and may not be cited, except for the purposes of establishing the doctrines of law of the case, res judicata, or collateral estoppel. 10th Cir. BAP L.R. 8010-2.

Jurisdiction and Standard of Review

There is no issue concerning the jurisdiction of this court to entertain the appeal, and the appropriate measure of review is the *de novo* standard.

Background

The debtor contracted with United Van Lines, Inc. to move his household goods from Texas to Kansas in 1998. When the goods were delivered to the agreed destination, the debtor failed to pay the freight and related charges. Consequently, United delivered the goods to Fry-Wagner Moving and Storage Company and ABC/Fry-Wagner, Inc., its agents at the delivery location, where they have remained in storage ever since.[1] The respondents claim to have a warehouseman's lien securing payment of their charges for transport and storage of the goods.

Subsequently the debtor filed his bankruptcy petition. He did not claim the goods held by the respondents as exempt in accordance with Fed. R. Bankr. P. 1007 and 4003(a).[2] Despite this fact, the debtor moved to avoid respondents' lien on the goods under 11 U.S.C. § 522(f)(1)(B)(i), which provides, in pertinent part,

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[1] United Van Lines, Inc., together with its agents Fry-Wagner Moving and Storage Company and ABC/Fry-Wagner, Inc., are collectively referred to as the "respondents."

[2] The only way to claim goods as exempt is by listing them on the schedule of assets required to be filed by Fed. R. Bankr. P. 1007. Fed. R. Bankr. P. 4003(a). According to the record, the debtor did not claim the goods in question as exempt in the schedules that he originally filed with the Bankruptcy Court. Our record contains a document that appears to be an amendment to the debtor's schedules, but we cannot discern from the copy in the Appendix whether it was filed with the Bankruptcy Court. In any event, the record is clear that the document was not before the Bankruptcy Court at the time that it entered the orders on appeal.

The debtor apparently has not sought to redeem the goods in question as provided by 11 U.S.C. § 722 and Fed. R. Bankr. P. 6008. Assuming that the debtor has amended his schedules to claim the goods as exempt, these provisions allow him to seek authorization from the Bankruptcy Court to redeem the goods by paying the allowed amount of respondents' secured claim as fixed by 11 U.S.C. § 506(a).

that a debtor may avoid "the fixing of a lien on an interest of the debtor in property to the extent that such lien impairs an exemption to which the debtor would have been entitled . . . if such lien is– . . . (B) a *nonpossessory*, nonpurchase-money security interest in any– (i) household furnishings, household goods . . . ." 11 U.S.C. § 522(f)(1)(B)(i) (Emphasis supplied). The Bankruptcy Court denied the motion, concluding that respondents' lien was not nonpossessory because they held the goods in their custody pursuant to a valid lien that entitled them to possession.[3]

The debtor moved for rehearing, arguing that goods valued under $400 were exempt under § 522(d)(3). At a hearing on the debtor's motion, the debtor admitted that his § 522(d)(3) argument was not valid. The Bankruptcy Court denied the debtor's motion and explained on the record that § 522(f) did not apply because the debtor had failed to claim the goods as exempt in his schedules. Even if he had, the respondents' liens were not avoidable under § 522(f) because they held a possessory interest in the goods. On January 24, 2001, the bankruptcy court entered an "Order Denying Debtor's Motion for Rehearing on Motion to Exempt Household Goods."

The debtor filed a timely notice of appeal, stating that he appeals "from the order of the bankruptcy court entered in [the] proceeding denying [his] motion for rehearing on motion to exempt household goods on the 24th day of January, 2001." Although the debtor's notice of appeal appears to be from only the Order denying his motion for rehearing, the intent of the parties is clear that the sole issue for determination on this appeal is whether the respondents' lien is nonpossessory. Thus, we have grounds to review not only the order denying the debtor's motion for rehearing, but also the Bankruptcy Court's earlier order

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[3] The Bankruptcy Court also modified the automatic stay to allow the respondents to exercise their rights and remedies concerning debtor's goods. At the date of the arguments on the appeal the goods remained in storage.

denying his motion to avoid the respondents' liens under § 522(f). *See, e.g.*, Grubb v. FDIC, 868 F.2d 1151, 1154 n.4 (10th Cir. 1989); Artes-Roy v. City of Aspen, 31 F.3d 958, 961 n.5 (10th Cir. 1994).

Discussion

The respondents claim their lien under the provisions of Kansas' version of the Uniform Commercial Code, Kan. Stat. Ann. § 84-7-209, which says in pertinent part that "[a] warehouseman has a lien against the bailor on the goods covered by a warehouse receipt or on the proceeds thereof in his possession for charges for storage or transportation . . . ." Kan. Stat. Ann. § 84-7-209. This lien clearly attached to the goods when the respondents took possession of them and continues until they relinquish possession upon payment of the relevant charges.

They also rely upon the federal warehouseman's lien at 49 U.S.C. § 80109, which creates a lien similar to the Uniform Commercial Code.

In their brief the respondents rely on In re Sanders, 61 B.R. 381 (Bankr. D. Kan. 1986), where the Kansas Bankruptcy Court considered possessory liens in a different context. There the lien arose from a security interest a bank had in the debtor's goods that was, at the inception, clearly nonpossessory. Upon default the bank sued and took possession of the goods as provided by the default clause of the security agreement. Subsequently bankruptcy ensued, the debtor moved to avoid the lien under 11 U.S.C. § 522(f), and the Bankruptcy Court denied the motion, concluding that the bank's lien was possessory and, thus, unavoidable.

The respondents do not cite to the subsequent case from the District of Kansas, In re Vann, 177 B.R. 704 (D. Kan. 1995), which disagrees with Sanders. There the court held that because the bank's right to possession did not arise until default when it did eventually take possession, the lien remained nonpossessory. The court says, "[w]here the parties originally enter into a nonpossessory security agreement perfected by filing, a clause giving the secured party right to possess the collateral upon default does not render the security interest possessory within

the meaning of 11 U.S.C. § 522(f)(2)(B) where the secured party repossesses the equipment by self-help or by judicial action." 177 B.R. at 710.

This conflict between the federal courts in Kansas has not been resolved by the Court of Appeals. We need not reach the conflict, however, for the facts of this case distinguish it from both Sanders and Vann. Here, by virtue of the warehouseman's lien statutes, the respondents had a possessory lien from the moment they took possession of the goods to transport them from Texas to Kansas. This fact distinguishes it from the other two cases where the creditor was not entitled to take possession until default. Because the respondents' lien is possessory, § 522(f) does not apply, and the Bankruptcy Court did not err in denying the debtor's motion.

Furthermore, the Bankruptcy Court did not abuse its discretion in denying the debtor's motion for rehearing, whether that motion is reviewed as either a motion for a new trial under Fed. R. Civ. P. 59, incorporated in bankruptcy proceedings under Fed. R. Bankr. P. 9023, or a motion for relief from a judgment under Fed. R. Civ. P. 60(b), incorporated in bankruptcy proceedings under Fed. R. Bankr. P. 9024. *See* United States v. Messner, 107 F.3d 1448, 1453 (10th Cir. 1997) (applying abuse of discretion standard to motion for new trial); Stubblefield v. Windsor Capital Group, 74 F.3d 990, 994 (10th Cir. 1996) (applying abuse of discretion standard to 60(b) motion).

Rule 59(a) provides: "A new trial may be granted to all or any of the parties and on all or part of the issues . . . in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the United States." Fed. R. Civ. P. 59(a). A motion under Rule 59 may be granted if the judgment is based on manifest errors of law or fact, there is newly discovered evidence, amendment of the judgment is necessary to prevent manifest injustice, or there is intervening change in the controlling law. The Debtor did not mention these criteria in his motion for rehearing nor in his

argument to the Bankruptcy Court, and from the record before us, there were no grounds for granting a new trial under Rule 59.

Rule 60(b) provides:

> On motion and upon such terms as are just, the court may relieve a party . . . from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial . . . ; (3) fraud . . . , misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged . . . ; or (6) any other reason justifying relief from the operation of the judgment.

Fed. R. Civ. P. 60(b). As with Rule 59, the debtor failed to provide any argument or evidence that meets this criteria. As such, the Bankruptcy Court did not err in denying the debtor's motion for rehearing if construed as a Rule 60(b) motion.

Conclusion

Accordingly, we conclude that the Bankruptcy Court correctly held that § 522(f) does not apply because the lien in question is not nonpossessory, and its decision is AFFIRMED. The Bankruptcy Court also did not err in denying the debtor's motion for rehearing, and that order is AFFIRMED.